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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

NARINDER S. GREWAL et al., Plaintiffs and Appellants, v. NATIONAL WESTERN LIFE INSURANCE COMPANY, Defendant and Respondent.	B262181 (Los Angeles County Super. Ct. No. BC495864)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michelle R. Rosenblatt, Judge. Affirmed.

Fee Smith Sharp & Vitullo and Anthony L. Vitullo; Bradley & Gmelich, Barry A. Bradley and Robert Crook, for Plaintiffs and Appellants.

Norton Rose Fulbright, Peter H. Mason and Spencer Persson, for Defendant and Respondent.

INTRODUCTION

Plaintiffs Narinder Grewal (Grewal), Pritpal Grewal, and Grewal M.D., a Medical Corporation (the corporation) (collectively, plaintiffs) appeal from the summary judgment in favor of National Western Life Insurance Company (National Western) on their claims for fraud, negligent misrepresentation, and professional negligence. The suit arises out of a failed investment scheme in which plaintiffs contributed $5.8 million to a welfare benefit plan, authorized at that time under Internal Revenue Code section 419A(f)(6), with the understanding that the corporation would be able to deduct as a business expense the premiums for certain long term benefits purchased by the plan for Grewal's benefit. As pertinent here, those benefits included four deferred annuities issued by National Western. After the Internal Revenue Service (IRS) disallowed the corporate tax deductions and imposed fines and penalties against the corporation and against Grewal individually, plaintiffs sued numerous parties, including National Western, alleging they had been misled into believing that the corporation's contributions to the welfare benefit plan would be tax deductible, when in fact the welfare benefit plan was known to be an abusive tax shelter and their participation in the plan virtually guaranteed IRS scrutiny, an audit, and disallowance of the deductions.

National Western moved for summary adjudication and/or summary judgment on a variety of grounds, mainly predicated on its assertion that it simply issued annuities to the welfare benefit plan at the request of the plan's administrator, NOVA Benefit Plans (Nova), and did not make any representations to plaintiffs about the tax benefits of the annuities or the deductibility of the premiums paid. We affirm the judgment in favor of National Western because the undisputed evidence establishes plaintiffs did not rely to their detriment on any statements attributable to National Western in connection with their decision to participate in the welfare benefit plan, or in connection with the purchase of annuities from National Western.

Plaintiffs also appealed from the amended judgment, which awarded $21,950 in costs to National Western. We conclude the trial court did not abuse its discretion in making its costs award.

FACTS AND PROCEDURAL BACKGROUND

Grewal is a doctor specializing in anesthesia and pain management. In the late 1990s, Grewal formed a medical corporation. In 2005, Grewal and his wife, Pritpal Grewal, were both shareholders in the corporation. In subsequent years, Grewal was the sole shareholder. As Grewal's practice became more profitable, he looked for ways to minimize both his individual and corporate tax burdens. To that end, Grewal and his wife met with William Howard, a tax attorney, in 2003. From that point forward, Howard consulted with the Grewals regularly, providing legal and tax advice under the auspices of his law firm, Hahn, Howard and Greene, as well as financial planning advice through a separate company, Tax & Financial Strategies.

In late 2004, Howard recommended that Grewal participate in an employee welfare benefit plan authorized under Internal Revenue Code section 419A(f)(6) (the plan).[1] Howard advised Grewal that by using a welfare benefit plan, his employer (the medical corporation) could make unlimited, tax-deductible contributions to a trust created under the plan, and then the trust could use those funds to purchase a variety of employee benefits for Grewal, such as long term disability insurance, medical benefits, long term care insurance, and life insurance. Howard further advised that when Grewal received the benefits in the future, they would be treated by the IRS as tax-exempt employee benefits. As represented by Howard, the plan would avoid all taxes on the money Grewal put into the plan—money which would eventually come out of the plan for Grewal's benefit.

In late 2005, Grewal consulted with William Alexander, a pension plan administrator. Alexander spoke to Grewal about a different type of employee benefit

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[1] The parties refer to this plan as the NOVA SADI Plan. In the interest of clarity, we refer to it simply as "the plan."

plan, authorized under Internal Revenue Code section 419(e) (the 419(e) plan), which would also allow the corporation to provide benefits to Grewal, but which would allow him to borrow money against the funds placed into the plan. Grewal favored the 419(e) plan and gave Alexander a check. However, when Grewal spoke to Howard about his decision to participate in a 419(e) plan, Howard "strongly objected" and again urged Grewal to participate in the plan he previously recommended.

Howard believed the plan he recommended, which was administered by Nova, complied with Internal Revenue Code section 419A(f)(6). In forming that opinion, Howard obtained, reviewed and analyzed information provided by Nova, including an opinion letter from the law firm of Edwards & Angell concluding that Nova's plan was sound and compliant with IRS regulations. Howard reviewed these materials with Grewal. Jason Willett, an associate at Howard's financial planning firm, also participated in meetings with Grewal and provided him with information from Nova about the plan. Willett was licensed to sell life insurance and annuities on behalf of several companies, including National Western, beginning in 2008.

Grewal decided to participate in the plan, in reliance upon the materials and advice provided by Howard. The corporation made substantial contributions to the plan over the next several years. In late 2005, the corporation contributed $2 million to the plan. Nova subsequently directed the purchase of insurance products for the benefit of Grewal, including, as is pertinent here, a deferred annuity issued by National Western. Alexander was the agent of record for the sale. In 2006, the corporation contributed $2.3 million to the plan. The plan used those funds to purchase two additional deferred annuities from National Western, and Alexander was the agent of record for both. In 2007, the corporation contributed $1.5 million to the plan. The plan used those funds to purchase a fourth deferred annuity from National Western. This time, Willett was the agent of record for National Western. In each of those years, the corporation listed the amount contributed to the plan, and more particularly the premiums paid for the deferred annuities issued by National Western, as a deduction on its corporate tax returns.

National Western is in the business of issuing insurance policies and annuities; it had no role in creating or administering the plan. Because National Western could not issue a qualified annuity for Grewal, and did not have the time or money to develop a new product specifically for the plan, National Western said it would issue a non-qualified annuity if the annuitant (Grewal) and the trustee of the plan agreed that a non-qualified annuity was appropriate for the plan. With respect to each of the non-qualifying annuities it issued, National Western required both the plan trustee and Grewal to sign a special acknowledgment form stating that the annuity was non-qualified, i.e., the premiums would not be tax deductible. The 2005 form read as follows: "I understand that the National Western Life annuity policy [policy number] has been issued as a non-qualified annuity contract where the SADI Trust 2005 is the owner of the contract. I understand that it is the responsibility of the trustee of the SADI Trust 2005 and NOVA Benefit Plan LLC as the Plan Sponsor to provide any tax reporting and/or other financial information that may be required. In addition, I understand that [National Western] and the annuity contract [number] serves as a funding vehicle only and does not provide any plan administration." Grewal signed the acknowledgments. He also signed a second disclosure, acknowledging National Western was making no representations regarding the tax consequences of the annuity purchase, specifically including whether "the Employer will be allowed a current income tax deduction for amounts contributed to the Plan."

In late 2007, the IRS notified Grewal's corporation that it was reviewing the deductions taken by the corporation in 2005 in relation to the plan. The IRS subsequently disallowed the deductions taken by the corporation in 2005, 2006, 2007, for contributions made to the plan. In 2014, the IRS issued a final determination that Grewal and the corporation owed back taxes, interest and penalties in excess of $3.5 million.

Grewal, his wife, and the corporation filed the present suit against numerous parties including Howard, Willett, Alexander, Nova, and National Western. As is pertinent here, the complaint asserts causes of action for fraud, negligent

misrepresentation and professional negligence against National Western. With respect to the fraud and negligent misrepresentation claims, plaintiffs generally allege that National Western, directly and through the actions of its alleged agents (Howard and Willett), misrepresented the viability of the plan as a legitimate, tax-favored investment vehicle. The professional negligence claim alleges generally that National Western failed to act as a reasonable insurance company should under the circumstances because it misrepresented the viability of the plan and failed to adequately advise the plaintiffs concerning the substantial tax and investment risks associated with that particular type of welfare benefit plan.

National Western moved for summary judgment and/or summary adjudication on several grounds. National Western asserted that its only business is to sell life insurance and annuities; it does not offer tax advice, nor is it qualified to do so. Further, National Western claimed it did not participate in any way in marketing or managing the plan, and had no role in plaintiffs' selection of that plan, which is the focus of the complaint. National Western also asserted that neither Alexander nor Willett, who were alleged to have persuaded plaintiffs to participate in the plan, were agents of National Western at the time plaintiffs made that decision.

The trial court granted National Western's motion for summary judgment. As an initial matter, the court sustained National Western's objections to certain portions of Grewal's declaration that contradicted his deposition testimony regarding the sale of the deferred annuities. The court went on to find that neither Willett nor Alexander acted as an agent of National Western in connection with the sale of the plan to plaintiffs. As a result, the court concluded that any misrepresentations or omissions by Willett and Alexander could not form the basis of a claim against National Western.

The court entered judgment in favor of National Western on November 21, 2014, and awarded costs in an amount to be determined; National Western served plaintiffs with notice of entry of that judgment on December 4, 2014. After the court denied plaintiffs' motion for new trial, plaintiffs timely appealed. National Western filed a memorandum of costs and plaintiffs filed a motion to tax or strike the costs. On

March 3, 2015, the court granted the motion to strike in part, awarded costs in the amount of $21,950, and amended the judgment to reflect that determination. Plaintiffs filed a second notice of appeal from the amended judgment. We consolidated the appeals for all purposes on September 30, 2015.

CONTENTIONS

Plaintiffs contend the trial court erred by sustaining objections to portions of Grewal's declaration, which portions were designed to create a dispute of material fact concerning representations made by National Western's alleged agents, Jason Willett and William Alexander, regarding the purchase of deferred annuities from National Western. Further, plaintiffs contend the trial court erred by finding that neither Alexander nor Willett was an agent of National Western at the pertinent times. More generally, plaintiffs assert the court erred by granting summary adjudication on each of its three claims against National Western, contending issues of material fact abound concerning National Western's role in plaintiffs' decision to participate in the welfare benefit plan and the decision to purchase deferred annuities with the funds invested in the plan. Finally, plaintiffs contend the court erred by denying in part their motion to strike or tax National Western's costs.

DISCUSSION

A. Standard of Review

The applicable standard of review is well established. "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) As such, the summary judgment statute (Code Civ. Proc., § 437c), "provides a particularly suitable means to test the sufficiency of the plaintiff's prima facie case and/or of the defendant's [defense]." (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 203.) A summary judgment motion must demonstrate that "material facts" are undisputed. (Code Civ. Proc., § 437c, subd. (b)(1).) The pleadings determine the issues to be addressed by a summary

judgment motion. (*Metromedia, Inc. v. City of San Diego* (1980) 26 Cal.3d 848, 885, revd. on other grounds *Metromedia, Inc. v. San Diego* (1981) 453 U.S. 490.)

"A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (Code Civ. Proc., § 437c, subd. (f)(1).) Similar to summary judgment, the moving party's burden on summary adjudication is to establish evidentiary facts sufficient to prove or disprove the elements of a claim or defense. (*Id.*, § 437c, subds. (c), (f).) The moving party "bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar, supra,* 25 Cal.4th at p. 850, fn. omitted.) A defendant moving for summary judgment must " 'show[ ] that one or more elements of the cause of action . . . cannot be established' by the plaintiff." (*Id.* at p. 853, quoting Code Civ. Proc., § 437c, subd. (o)(2).) A defendant meets its burden by presenting affirmative evidence that negates an essential element of plaintiff's claim. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*).) Alternatively, a defendant meets its burden by submitting evidence "that the plaintiff does not possess, and cannot reasonably obtain, needed evidence" supporting an essential element of its claim. (*Aguilar, supra,* 25 Cal.4th at p. 855.)

On appeal from summary judgment, we review the record de novo and must independently determine whether triable issues of material fact exist. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767; *Guz, supra,* 24 Cal.4th at p. 334.) We resolve any evidentiary doubts or ambiguities in favor of the party opposing summary judgment. (*Saelzler v. Advanced Group 400, supra,* p. 768.)

In performing an independent review of the granting of summary judgment, we conduct the same procedure employed by the trial court. We examine (1) the pleadings to determine the elements of the claim, (2) the motion to determine if it establishes facts justifying judgment in the moving party's favor, and (3) the opposition—assuming movant has met its initial burden—to "decide whether the opposing party has demonstrated the existence of a triable, material fact issue. [Citation.]" (*Oakland*

Raiders v. National Football League (2005) 131 Cal.App.4th 621, 629-630 (*Oakland Raiders*).) We need not defer to the trial court and are not bound by the reasons in its summary judgment ruling; we review the ruling of the trial court, not its rationale. (*Ibid.*)

B. The Trial Court Properly Granted Summary Judgment In Favor Of National Western Because Plaintiffs Did Not Rely On Any Representations Or Omissions By National Western Or Its Alleged Agents.

As to each of the three causes of action against National Western, plaintiffs must establish they relied to their detriment on the misrepresentations or omissions they contend were made by National Western directly, or by Jason Willett or William Alexander as National Western's alleged agents.[2] (See *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638 [elements of fraud include justifiable reliance]; *National Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Services Group, Inc.* (2009) 171 Cal.App.4th 35, 50 [elements of negligent misrepresentation include justifiable reliance]; *Turpin v. Sortini* (1982) 31 Cal.3d 220, 229 [professional negligence claim requires causal connection between negligent conduct and injury, which on the facts of the present case requires that plaintiffs relied on the allegedly negligent failure to disclose tax-related consequences of investing in the plan and/or the deferred annuities].) We conclude the trial court properly granted summary judgment because the undisputed facts establish that plaintiffs did not rely on any representations or omissions attributable to National Western either in making the decision to participate in the plan, or in connection with the decision to purchase deferred annuities from National Western with the funds invested in the plan.

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[2] Although the complaint alleges Howard was an agent of National Western, plaintiffs now concede he was not.

1. The undisputed facts establish plaintiffs did not rely on representations or omissions by National Western or its alleged agents when they opted to participate in the plan.

As the trial court recognized, the primary focus of plaintiffs' complaint relates to representations made about the anticipated tax advantages of participation in the plan. As is pertinent here, the operative complaint alleges plaintiffs participated in the plan and suffered financial harm (in the form of the assessment of back taxes, penalties and interest against the corporation and Grewal individually) because the IRS disallowed the corporation's deduction of contributions to the plan in 2005, 2006 and 2007, including the premiums paid for the deferred annuities issued by National Western. According to the complaint, plaintiffs participated in the plan because (1) they understood that by doing so, the corporation could purchase investment vehicles for Grewal's benefit and deduct the premiums as a business expense, resulting in a significant tax savings, (2) they also understood welfare benefit plans authorized by Internal Revenue Code section 419A(f)(6) were a legitimate and safe investment vehicle, approved by the IRS, and (3) they further understood that the plan administered by Nova was a legitimate welfare benefit plan that provided a long term, tax-free investment opportunity.

The complaint contains numerous allegations relating to plaintiffs' reliance upon the advice of others (especially Grewal's tax attorney, William Howard) concerning the tax benefits of participating in the plan—advice which plaintiffs contend included intentional or negligent misrepresentations, or which did not fully disclose the risks attendant to welfare benefit plans authorized by Internal Revenue Code section 419A(f)(6). Relevant here, plaintiffs contend National Western had a duty to disclose facts about the plan, including: Grewal's investment in the defective plan would virtually guarantee the IRS would audit him, Grewal would incur substantial expenses in defending the audit, would ultimately lose the audit, and not only have to pay taxes on the sums previously invested, but also interest and penalties; the IRS perceived these type of plans as abusive tax shelter and not compliant with Internal Revenue Code section 419A(f)(6) and that the IRS was not going to allow the deduction

to the contribution into these types of plans; the IRS promulgated proposed IRS regulations in July 2002 which made most of the 419A(f)(6) plans in existence non-compliant, and the IRS proposed regulations of July 2002 made the investment non-compliant with IRS regulation 419A(f)(6); and Grewal would in all reasonable likelihood never achieve the economic results as represented during the sale of the plan.

This theory of liability fails because the undisputed facts establish National Western did not make any recommendations to plaintiffs before they made their decision to participate in the plan. Accordingly, plaintiffs cannot establish they relied on any statements or omissions attributable to National Western directly or through its alleged agents. At deposition, Grewal testified he did not know National Western would have any role in the plan when he made the decision to participate in the plan. He stated, for example, that the "insurance company was not ever in the picture when I got into the plan, to tell you the truth." He also confirmed that he "was told by Will Howard and Jason Willett . . . that the trust is going to own this money and they are going to invest in–in a way or form that the trust wants to make sure that you retain the value of your money. And they never mentioned Columbus . . . National Western or Fidelity. They–this was never, you know, disclosed to me." Further, Grewal conceded that he first learned National Western would have some role in implementing the plan several months *after* he decided to participate in the plan. Specifically, he said, "I didn't know that I was buying National Western annuities . . . when I signed the adoption documents for [the plan]. So all these things came months later when I was already in the plan." Grewal also conceded he had no direct contact with and received no materials or tax advice from National Western at any time. Accordingly, the undisputed facts—mainly Grewal's own testimony—establish National Western was uninvolved in plaintiffs' decision to participate in the plan.

Plaintiffs argue that even if National Western is not directly liable for any misrepresentations, it is vicariously liable for misrepresentations and omissions made by its alleged agents, Alexander and Willett. This theory of liability fails as well. It is undisputed that Willett, who worked with Howard, did not become an agent for

National Western until September 2008, long after Grewal first decided to participate in the plan and months after he made his final contribution to the plan. Accordingly, Willett could not have been acting as an agent for National Western when plaintiffs decided to participate in the plan. As to Alexander, it is undisputed that he was authorized to sell National Western products at the pertinent times. However, Alexander recommended plaintiffs participate in a welfare benefit plan authorized under Internal Revenue Code section 419(e)—an entirely different plan than the one plaintiffs ultimately chose. Plaintiffs cannot establish they relied to their detriment on Alexander's advice because they rejected it.

In any event, the undisputed facts show that in making the decision to participate in the plan, plaintiffs relied upon representations made by Howard, Nova, and the law firm of Edwards & Angell—not National Western. Howard received a due diligence packet regarding the plan from Nova, which included a legal opinion letter from Edwards & Angell regarding the plan offered to plaintiffs. The opinion letter concluded the welfare benefit plan offered by Nova would provide a significant tax savings for both employer and employee participants in the plan. Grewal reviewed the Nova packet, as well as the opinion letter from Edwards & Angell, with Howard. Grewal testified that after he reviewed the packet with Howard, especially the opinion letter, he was "100 percent convinced" that he should follow Howard's advice and participate in the plan.

Accordingly, we conclude no dispute of material fact exists as to whether National Western made misrepresentations about or failed to disclose facts relating to the plan, upon which plaintiffs relied to their detriment when they decided to participate in the plan.

2. The undisputed facts establish plaintiffs did not rely on statements or omissions by National Western or its alleged agents in connection with the purchase of deferred annuities.

Plaintiffs also contend they relied on misrepresentations by National Western and its alleged agents,[3] Alexander and Willett, when they made the decision to purchase National Western annuities with the funds they invested in the Plan. Further, plaintiffs argue National Western and its alleged agents failed to disclose a number of facts relating to the tax consequences of purchasing annuities when they made their decision to purchase annuities with the money invested in the plan. Plaintiffs cannot establish that they relied to their detriment on any misrepresentations or omissions about the deferred annuities because the undisputed facts show Nova, not plaintiffs, decided to purchase annuities from National Western.

a. Theory of liability is not stated in the complaint.

As just stated, plaintiffs seek to hold National Western liable for making misrepresentations and omissions which they contend led to plaintiffs' decision to purchase deferred annuities from National Western. We note, as an initial matter, that this theory of liability is not evident from the complaint.

A party cannot generally defeat a summary judgment by pointing to a theory of liability or defense that has no basis in the pleadings. "[T]he pleadings set the boundaries of the issues to be resolved at summary judgment. [Citations.] A 'plaintiff cannot bring up new, unpleaded issues in his or her opposing papers. [Citation.]' [Citations.] A summary judgment or summary adjudication motion that is otherwise sufficient 'cannot be successfully resisted by counterdeclarations which create immaterial factual conflicts outside the scope of the pleadings; counterdeclarations are no substitute for amended pleadings.' [Citation.] Thus, a plaintiff wishing 'to rely upon

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[3] Because we conclude plaintiffs did not rely on the misrepresentations or omissions they have identified, we need not, and therefore do not, determine whether either Willett or Alexander was acting as an agent of National Western, as plaintiffs contend.

unpleaded theories to defeat summary judgment' must move to amend the complaint before the hearing. [Citations.]" (*Oakland Raiders, supra,* 131 Cal.App.4th at p. 648.) "And in moving to amend, he must '[i]nclude a copy of the proposed amendment or amended pleading.' (Cal. Rules of Court, rule 3.1324(a)(1); cf. 5 Witkin, [Cal. Procedure], Pleading, § 1200, p. 632 [in absence of proposed amendment, it will be 'almost impossible to show an abuse of discretion in denying the motion'].)" (*Dang v. Smith* (2010) 190 Cal.App.4th 646, 664.)

The operative complaint contains only a few allegations regarding the deferred annuities issued by National Western, all of which focus on the payment of commissions to Willett and Alexander. For example, plaintiffs allege "Defendant Howard and Defendant Willett told Plaintiffs to select National Western . . . to supply the annuities . . . because of the high-commission annuities it offered and because they knew [National Western]'s . . . willingness to participate in the fraudulent welfare benefit plan scheme to generate high-dollar annuity . . . sales for themselves." Plaintiffs allege they were harmed because National Western paid Howard and Willett "exorbitant" commissions on the sale of the annuities. In their fraud claim, plaintiffs allege National Western failed to disclose that "[a] substantial percentage of the premiums paid toward the policies and annuities were used by [National Western] . . . to pay commissions to the respective agents and that virtually all of the money invested during the first year was immediately lost because of this." The professional negligence claim also asserts National Western was negligent by "[f]ailing to disclose to Plaintiffs the significant commissions that agents were earning with respect to the insurance products sold to Plaintiffs."

Plaintiffs appear to have abandoned this theory of liability, as they have not advanced any argument or legal authority on this point in their appellate briefing. Nevertheless, they assert an additional theory of liability against National Western relating to National Western's alleged failure to disclose the risks and possible tax consequences attendant to the purchase of non-qualified deferred annuities by the plan. As the court observed, this additional theory is not found in the operative complaint, and

plaintiffs did not request the opportunity to amend their complaint to include those theories. However, we address the merits of these additional theories briefly in order to address the issues as framed by the parties.

b. The court properly disregarded the portions of Grewal's declaration that conflict with his deposition testimony.

Plaintiffs contend the court erred by sustaining National Western's objections to eight paragraphs of Grewal's declaration, submitted in support of plaintiffs' opposition to the motion for summary judgment and/or adjudication. The court sustained the objections because it determined certain statements in the declaration contradicted Grewal's prior deposition testimony. The objected-to statements in Grewal's declaration are critical to plaintiffs' case, inasmuch as they provide the only supporting evidence, in most cases, for plaintiffs' contention that National Western (through its alleged agents) either made misrepresentations or failed to disclose information it was required to disclose concerning the deferred annuities, and that plaintiffs relied upon those statements and/or omissions to their detriment. We conclude the court did not err.

In *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, the Supreme Court held that a party may not defeat summary judgment by means of declarations or affidavits which contradict that party's deposition testimony or sworn discovery responses. (*Id.* at pp. 21-22; *Shin v. Ahn* (2007) 42 Cal.4th 482, 500, fn. 12.) "Properly applied, the *D'Amico* rule allows the trial court to disregard a party's declaration or affidavit only where it and the party's deposition testimony or discovery responses are 'contradictory and mutually exclusive' [citation] or where the declaration contradicts 'unequivocal admissions' in discovery. [Citation]." (*Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 459-460.)

National Western objected to the portions of Grewal's declaration which claim Willett and Alexander induced plaintiffs to purchase deferred annuities from National Western. National Western asserted, and the court concluded, that those statements conflicted with Grewal's deposition testimony, because he testified then that he had not selected the annuities, and had simply been informed about their purchase. We agree.

In his declaration, Grewal claims Alexander (in 2005 and 2006) and Willett (in 2007) persuaded him to purchase annuities from National Western, and that he decided to purchase the annuities based upon affirmative representations by Alexander and Willett about the tax-deductibility of the premiums paid to purchase the annuities, and/or their failure to disclose that the premiums would not be tax-deductable. For example, Grewal states in paragraph 3 of his declaration: "In December 2005, Bill Alexander ('Alexander') convinced me to submit an application a [*sic*] [National Western] annuity in order to fund the Section 419A(f)(6) NOVA SADI Plan recommended by Jason Willett ('Willett')." In paragraph 7, Grewal further claims "[National Western], individually or through Willett or Alexander, who sold me the [National Western] annuities, did not disclose to me all of the substantial IRS pronouncements already against 419A(f)(6) plans, just like the NOVA SADI Plans, that were in force at the time [National Western] sold me annuities to fund the plan. Neither did [National Western], individually or through Willett or Alexander, who sold me the [National Western] annuities, the [*sic*] substantial risk of funding a 419A(f)(6) plan with annuities, due to the possibility of audit." The other statements in the Grewal declaration to which National Western objected are similar, and—if accepted—tend to support plaintiffs' contention that Grewal, not Nova, decided to purchase deferred annuities with the money invested in the plan.

However, Grewal's prior deposition testimony establishes he was uninvolved in the decision to purchase annuities from National Western. For example, with respect to the annuity purchased with the 2005 contribution, Grewal said that he signed a blank annuity application form and gave it to Alexander, who filled it out and submitted it to National Western at a later date. He admitted he signed the annuity applications "not knowing what was in there." Grewal also testified he didn't know who decided to purchase the deferred annuities, and that no one had ever discussed the features of National Western's annuities with him. Specifically, he testified as follows:

Q: How was National Western selected? Do you know?
A: It was just presented to me that this is the annuity that they are buying for you.
Q: Presented to you by who?
A: Will Howard.
Q: And he told you that National Western—a National Western annuity was going to be one of the vehicles by which you participated in the National—in the NOVA SADI plan; is that right?
A: That is correct.
Q: Okay. What else do you remember about that conversation?
A: I don't remember much, because I really didn't care where they were putting the money.

Grewal's testimony that he did not make the decision to purchase deferred annuities from National Western with funds the corporation contributed to the plan is consistent with his general understanding of the welfare benefit plan. He understood that after he made contributions to the plan, he would no longer have control over the funds. Instead, the plan would purchase investment vehicles on his behalf, and for his benefit.

Plaintiffs argue here that "Dr. Grewal's Declaration does not contradict his deposition testimony that he relied on Howard to invest money into the . . . Plan. Instead, it points out that he *also* relied on NWL agents Alexander and Willett in deciding to use the invested funds to purchase the non-tax-deductible [National Western] annuities." We are unpersuaded. As just described, Grewal stated at his deposition that he was uninvolved in the decision to purchase deferred annuities from National Western, yet he asserts in his declaration that he was induced to purchase those annuities by Alexander and Willett. These two positions are irreconcilable, and the trial court properly sustained the objections to the declaration and disregarded that evidence. We also disregard plaintiffs' factual assertions on appeal to the extent they are based upon those portions of Grewal's declaration.

c. The undisputed evidence establishes that Nova, not plaintiffs, decided to purchase deferred annuities from National Western with the funds invested in the plan.

Plaintiffs assert that they "could (and, in fact, did) rely on representations by their tax attorney William Howard to invest their money into the NOVA SADI Plan, and *also* rely on representations and omissions by Alexander, Willett—and [National Western] individually—to purchase [National Western] annuities with that invested money. . . . Alexander and Willett were agents of [National Western] at the time of the annuity purchases, and induced such purchases by their material misrepresentations and/or failure to disclose material information." We conclude the undisputed facts show plaintiffs did not make the decision to purchase deferred annuities from National Western, and therefore plaintiffs did not rely on any representation or omission made by National Western or its alleged agents concerning the annuities.[4]

As already explained, *ante*, Grewal testified at his deposition that he was uninvolved with the decision to purchase deferred annuities with the money contributed by the corporation to the plan. Other evidence confirms Nova, not Grewal, made that decision. Specifically, Jason Willett explained that Nova, not plaintiffs, purchased the annuities from National Western. Although Willett handled some of the paperwork related to the purchase of the annuities, he did so at the direction of Nova, the plan administrator. Willett did not choose deferred annuities, as opposed to any other

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[4] Because we conclude plaintiffs did not make the decision to purchase the deferred annuities, we need not discuss whether, or to what extent, National Western had a duty to make disclosures to plaintiffs in connection with the sale. In any event, plaintiffs have not cited any legal authority to support a claim that National Western had a fiduciary relationship with its annuitants which required it to make the disclosures identified by plaintiffs. While plaintiffs rely on *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 337, that case does not assist them inasmuch as it held only that a general duty of disclosure could arise under circumstances not present here. Further, and as noted above, the disclosures drafted by National Western and signed by Grewal explicitly state that National Western was making no representations regarding the tax consequences of the annuity purchase.

financial product. Rather, Nova told him "what carriers and products were available or approved" for the plan. On that point, Willett's testimony was unequivocal and uncontradicted:

> Q: And then how did you go about deciding, uh, to have Dr. Grewal's contribution amounts be utilized to purchase this annuity?
> A: I didn't make a decision. They told me which specific annuity was to be used inside the trust or the plan itself.
> Q: Who told you?
> A: Nova.

Willett further testified: "I was told what product to use, what insurance companies were available, what the underlying asset was supposed to be." Willett confirmed that he did not discuss the annuity purchases with Grewal because "he wasn't purchasing an annuity, he was making a contribution into a welfare benefit plan." As noted above, the plan purchased the annuities and was listed as the owner of the annuities. Accordingly, National Western communicated with Nova, not Grewal, in connection with the annuity purchase.

In sum, the evidence establishes that Nova, not plaintiffs, made the decision to purchase deferred annuities with the funds contributed to the plan. This fact is fatal to plaintiffs' claims because, as a result, they cannot establish they relied on any representations or omissions by National Western to their detriment.

C. The Trial Court Did Not Abuse Its Discretion By Denying In Part Plaintiffs' Motion To Tax National Western's Costs.

In connection with the summary judgment, the court awarded costs to National Western, as the prevailing party, in an amount to be determined. National Western subsequently submitted its memorandum of costs, claiming costs in the amount of $22,329. Plaintiffs filed a motion to tax National Western's costs, arguing that some of the claimed local travel costs, courier charges, and photocopying costs should not be awarded. While the motion to tax was pending, National Western withdrew its request for exhibit costs of $54.25 and $55.82 in messenger fees, due to a mathematical error contained in the cost memorandum. National Western also claimed an additional

$559.76 in costs relating to its opposition to plaintiffs' motion for new trial, which brought the total costs requested to $22,779. Although plaintiffs did not appear at the hearing on the motion to tax National Western's costs, the court disallowed some of the claimed expenses. The court awarded National Western costs in the amount of $21,950—$829 less than the amount originally claimed.[5]

Plaintiffs contend the court erred by awarding National Western costs not reasonably necessary to the litigation and/or not recoverable under Code of Civil Procedure section 1033.5. That section provides that recoverable costs include "[t]ravel expenses to attend depositions." (Code Civ. Proc., § 1033.5, subd. (a)(3)(C).) In addition, the court has the discretion to award other costs not specifically provided for under that code provision. As to all cost items, the court may only award items "reasonably necessary to the conduct of the litigation," and which are "reasonable in amount." (Code Civ. Proc., § 1033.5, subd. (c)(2) & (3).) We review the court's award of costs for an abuse of discretion. (See *Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332.)

Plaintiffs assert the court should not have allowed National Western to recover $114 for parking related to depositions taken in Los Angeles County. Citing *Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761 (*Ladas*), plaintiffs assert "[p]arking for local travel is not recoverable." Plaintiffs' reliance on *Ladas* is misplaced, however, because there the court determined only that claimed local travel expenses *unrelated to depositions* were not properly recoverable. The parking costs are recoverable.

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[5] Although the record contains a copy of the court's tentative ruling on the motion to tax costs, it does not contain the court's final written order, if it issued one. Further, plaintiffs have not provided us with a transcript or settled statement of the hearing on their motion to tax National Western's costs—presumably because they did not attend the hearing. Accordingly, we do not know for certain which item(s) the court taxed. We know only that it taxed National Western's costs by $829.

Plaintiffs also contend mileage and meals related to local depositions are not recoverable, citing *Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44. Plaintiffs' reliance on this case is also misplaced to some extent, as it states only that meals eaten while attending local depositions are not recoverable. (*Id.* at p. 72.) Thus, the court should have disallowed $13.60 for local meals relating to Grewal's deposition. The court's tentative ruling indicates it planned to tax National Western's costs in that amount and we conclude it most likely did so. The balance of the claimed amounts are recoverable.

In addition, plaintiffs argue the court erred by not taxing $694.93 in attorney meal charges related to depositions, a $1,467.40 hotel charge related to depositions, $92 in local parking fees, and $516.18 in messenger delivery fees and rush charges, because those expenses were not reasonably necessary to the litigation. As to these items, we defer to the court's exercise of its discretion. The court's tentative ruling reflects that it carefully reviewed each item requested by National Western and evaluated it for reasonableness. Assuming the court disallowed $13.60 for local meals, it discounted these additional items in the amount of $815 based upon its assessment of what was reasonably necessary to the litigation. There are no facts in the record before us to suggest the court abused its discretion in this regard.

DISPOSITION

The judgment is affirmed. Respondent National Western shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

ALDRICH, J.